Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1135

ARTHUR STRAHL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOSEPH J. BALLIRO
MARK G. MILIOTIS
One Center Plaza
Boston, Massachusetts 02108
(617) 227-5822
Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Arthur Strahl respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on December 26, 1978.

Opinion Below

The opinion of the Court of Appeals for the First Circuit has not yet been published in the official reports. A copy of the opinion is attached hereto as Appendix A. (App. 15-24)

Jurisdiction

The judgment sought to be reviewed was entered by the United States Court of Appeals for the First Circuit on December 26, 1978. No petition for rehearing was filed because of the limitation of such petitions to new matters under Local Rule 15 of the First Circuit.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

Questions Presented for Review

1. Whether or not the Government failed to comply with the relevant provisions of 18 U.S.C. §3500, requiring the United States upon motion of the defendant to produce any statement of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified on direct examination.

2. Whether or not the Government has failed to comply with the relevant provisions of 18 U.S.C. §3500 and Fed. Rules Cr. Proc. rule 16, 18 U.S.C., as well as the case law in *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976) and *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), requiring the United States to provide to the defendant exculpatory evidence, evidence useful for impeachment purposes, and information revealing perjury by a government witness.

Statutes Involved

18 U.S.C. §§1708, 371, 471, 472, 3500. The text of these sections is attached hereto as Appendix B (App. 25-28)

Statement of the Case

The petitioner was charged and convicted with others with possession of a $5,000 United States Treasury note stolen from the United States mails, of counterfeiting and conspiring to counterfeit $5,000 Treasury notes, and of possessing, concealing, and attempting to pass the counterfeited notes, 18 U.S.C. §§371, 471, 472, 1708. He was sentenced after a jury trial to four years imprisonment on the conspiracy count, with sentences of the same duration on the other charges to run concurrently.

The convictions arose in the context of a four-count, superseding indictment returned on April 20, 1977. The Government's case rested primarily upon the testimony of one Markella, an attorney of petitioner Strahl's, as well as Curran and Lombardo, who were participants in the alleged counterfeiting scheme.

The petitioner filed appropriate discovery motions before trial and moved during trial for the production of certain statements made by the witness Lombardo in the possession of the Government, pursuant to 18 U.S.C. §3500(b). Petitioner moved for a mistrial and for dismissal during the trial because discoverable grand jury statements of Curran which could have been used to impeach Lombardo were not delivered to counsel in a timely fashion. Petitioner moved at trial to strike the testimony of Curran as incredible and unworthy of consideration. Objections were made during trial to the testimony of Markella on the basis of attorney-client privilege, and to the introduction of evidence that similar counterfeit Treasury notes had been seized in other parts of the country on the basis of relevance and prejudice. These motions and objections were ruled on adversely by the trial judge and such rulings were the basis for petitioner's appeal to the United States Court of Appeals for the First Circuit.

Petitioner's motion for the production of a statement by Lombardo arose when it was revealed during cross-examination that the witness had made more than one statement to the Assistant United States Attorney. Defense counsel was only in possession of one such statement. At the sidebar the Assistant United States Attorney represented to the Court that the second statement was not within the scope of 18 U.S.C. §3500 and need not be produced. The Court ruled without any further consideration than the Government's assertions that there need not be another statement produced. Defense counsel renewed his motion after further cross-examination of Lombardo revealed that the witness had told his story to the Assistant United States Attorney, and that he had gone over it with him. The motion was denied without an *in camera* examination of the statement, a voir dire, or any further inquiry of the witness.

During his testimony Lombardo portrayed himself as not having been involved in criminal activity before this incident. Grand jury testimony of Curran, however, referred to previous criminal involvement by Lombardo as a cameraman in illegal activities. The transcripts of this grand jury testimony were not given to defense counsel until after Lombardo had already testified. Defense counsel all objected to the tardy delivery of the grand jury testimony and moved for mistrial. Petitioner moved for dismissal as well. The Trial Court denied all motions. Counsel for petitioner suggested that immediate action be taken in the alternative to minimize the harm, but the Court did not respond other than to point out that Lombardo could not be recalled by the defense.

Reasons for Granting the Writ

A. The Opinion of the Court of Appeals for the First Circuit Is Contrary to the Intent and Language of 18 U.S.C. §3500.

The manner in which the trial court denied the petitioner's request for a "statement", 18 U.S.C. §3500(e), made by Government witness Lombardo to the Assistant United States Attorney was clearly in error, and the Court of Appeals for the First Circuit failed to correct this error by not remanding the issue to the District Court for hearing and a possible retrial.

In the opinion below, the Court of Appeals stated that if the determination of the District Court had been based solely on the Government attorney's assurances at the bench that his interview notes were not a statement under 18 U.S.C. §3500(e), then it would have been compelled to remand for a more thorough hearing. Nevertheless, the Court of Appeals found that defense counsel's cross-examination of the witness Lombardo elicited just "barely enough" information to form a basis for the judge's decision. The standard that had to be met for the interview notes to be raised as a "statement" is found in 18 U.S.C. §3500:

> "(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement."

By stopping at a mere rebuke to the District Court, and by referring to other "strong evidence of guilt", the "fact that the defense had another 'statement' of Lombardo's with which to impeach the witness," and "the extensive impeachment of Lombardo on cross-examination" in order to reinforce its opinion, the Court of Appeals fell short of its duty and acknowledged consideration of factors that had no bearing on the point in issue.

Goldberg v. *United States,* 424 U.S. 94, 96 S.Ct. 1338 (1976), *Campbell* v. *United States,* 365 U.S. 85, 81 S.Ct. 421 (1961) (*Campbell I*), and *Campbell* v. *United States,* 373 U.S. 487, 83 S.Ct. 1356 (1963) (*Campbell II*) established guidelines and procedures for determining a "statement" under 18 U.S.C. §3500(e). These cases state that there is a "duty in the trial judge affirmatively to administer the statute in such a way as can best secure relevant and available evidence." *Campbell I,* 365 U.S. at 95, 81 S.Ct. at 427. This Court has recognized "that a Government objection to production may require that the trial court inspect documents or hold a hearing to gather extrinsic evidence bearing on the extent to which the documents are statements producible under §3500." *Goldberg,* 424 U.S. at 108, 96 S.Ct. at 1357.

After the bench conference in which the Government attorney gave assurances which the Court of Appeals has already determined were insufficient to establish that the subject document was not a "statement" under 18 U.S.C. §3500(e), the following discourse between petitioner's counsel and the witness Lombardo took place:

"Q. (by Mr. Balliro) This second occasion that we are talking about, Mr. Lombardo, took place in this building, in the United States Attorney's office, is that correct?

A. Correct.

Q. And was it at a time when you were interviewed by Mr. Hammond, the prosecutor in this case?

A. Yes.

Q. And how long did that interview take?

A. Maybe an hour and maybe a little longer.

Q. And during the course of it, were notes made?

A. Yes.

Q. And did Mr. Hammond go over your story with you?

A. In what manner?

Q. What you were telling him, did he go over it with you?

A. He just told me to give my story.

Q. And did he just write it down verbatim as you gave it?

A. He asked me questions.

Q. He asked you questions about what you told him, isn't that correct?

A. I would assume that.

Q. And did he go over with you everything that you told him to make sure that what you were telling him was satisfying him that it was correct?

A. I can't answer that.

Q. Did he go over it with you, Mr. Lombardo?

A. Yes, he went over it with me.

Mr. Balliro: I would resume my request.

The Court: I deny it.

The Court of Appeals decided that the information gathered by this examination was sufficient basis for the trial judge's ruling so as not to compel remanding the case for further hearing. It is to be noted that the trial judge never even examined the document in question *in camera* before he denied its production! Such an examination appears on the face of the cases (cited above and below) to be a rudimentary procedure in evaluating the present question.

In a Third Circuit opinion, *United States* v. *Waldon*, 578 F.2d 966 (3d Cir. 1978), it was held that "the district court erred by not at least inspecting the materials." *Id.* at 970. The opinion cited *United States* v. *Johnson*, 521 F.2d 1318 (9th Cir. 1975) for the proposition that it was error to fail to inspect the notes. A Fifth Circuit opinion, *United States* v. *Judon*, 567 F.2d 1289 (5th Cir. 1978) offers a comprehensive view of this problem. Citing *Campbell I, supra*, the Court found that a mere inspection of the document at issue was not enough in the case where there was anything before the trial judge to suggest that the witness had ever adopted or approved any notes the government investigator might have written down. The Second Circuit's holding in *United States* v. *Lamma*, 349 F.2d 338 (2d Cir. 1965), cited in *Judon, supra* at 1292, stated that only if there is something in the witness' testimony or in the document containing the written statement that suggests that there may have been an adoption or approval by the witness does the trial judge have a duty to conduct a voir dire to determine whether or not there was such adoption or approval. Such language imposes a "duty" to conduct a voir dire under circumstances that are easily met by the facts in the present case. As stated in *Campbell I* and cited in *Judon* at 1292, there are certain questions that need be asked where there arises a viable issue as to production. Such inquiry may be undertaken by the trial judge if necessary, and it should include whether the interviewer was writing down what the witness told him, and whether the witness read the notes over to see if they were right or otherwise adopted or approved them. If, in the present case, the trial judge considered the cross-examination to be sufficient inquiry as to these two issues, then the responses to such inquiry, the petitioner must suggest, were enough to at least require further inquiry.

A further reason for granting the writ lies in the apparent discrepancies between the circuits in their application of the rules in 18 U.S.C. §3500(b), (e). The Seventh Circuit in *United States* v. *Harris*, 542 F.2d 1283 (7th Cir. 1976), the Fifth Circuit in *United States* v. *Hodges*, 556 F.2d 366 (5th Cir. 1977), the Ninth Circuit in *United States* v. *Wood*, 550 F.2d 435 (9th Cir. 1976), and the Eighth Circuit in *United States* v. *Larson*, 555 F.2d 673 (8th Cir. 1977) have taken various views as to the proper application of the standards in 18 U.S.C. §3500(e). To lesser extents, the above four circuits approach what may now be considered the rule in the First Circuit, although the First Circuit appears to have gone further away from the path charted by *Campbell I* and *II* and *Goldberg*. A determination by this Court as to the proper procedures to be undertaken by the trial court in determining whether or not material is a "statement" under 18 U.S.C. §3500(e) is necessary. A clarification by this Court as to the amount of approval or type of adoption that is required on the part of the witness toward the written statement is also an appropriate purpose for granting this Writ.

B. The Opinion of the Court of Appeals Failed To Reflect the Intent of 18 U.S.C. §3500, Fed. Rules Cr. Proc., Rule 16, 18 U.S.C., and the Cases of *United States* v. *Agurs* and *Brady* v. *Maryland*.

The Government's failure to supply the defendant with exculpatory material contained in the grand jury testimony of the witness Curran in a timely fashion was a serious breach of prosecutorial responsibility established in the cases of *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976) and *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) and by statute in 18 U.S.C. §3500 and Rule 16 of the Federal Rules of Criminal Procedure. Information that could have been used to substantially impeach the

credibility of a key Government witness, Lombardo, was withheld until the impact and value of its use was severely diminished.

Contained in the above authorities are the concepts that the defense is entitled to information in the possession of the prosecution which is of an exculpatory nature, and that the defense is entitled to information which can be of value in impeaching prosecution witnesses. These concepts are founded upon the principles of fair trial and justice through the equalization of resources and the better opportunity to reach the truth.

The Government's failure to acknowledge at an appropriate point that the witness. Lombardo's statements that he had only an occasional social association with the alleged co-conspirators were controverted by Curran's grand jury testimony depicting Lombardo as the cameraman in at least one previous criminal scheme, was prejudicial and reversible error. The grand jury testimony of Curran was highly indicative of Lombardo's previous criminal involvement and contradicts Lombardo's testimony which projects himself as a reluctant, innocent dupe:

"Question: (Juror) Who was the cameraman on the two others? Was it Lombardo?
"Question: (Mr. Hammond) Let's take that one at a time. Do you know who was the cameraman on the check? The personal checks that you did for Strahl in December?
"Answer: (Curran) I'm pretty sure it was Lombardo.
"Question: What makes you think it was Lombardo?
"Answer: I do. That's all.
"Question: Well, did someone tell you that or is that just an impression you gathered?

"Answer: That's my best memory, that it is Lombardo.
"Question: But my question is, did someone tell you this or did you just get that impression, or do you know or do you not remember how you learned it?
"Answer: I really don't remember how I learned it."

The crucial point at which this information could have been utilized was during Lombardo's examination. The delay irreparably harmed the defense's ability to further impeach a key Government witness. On the basis of Lombardo's potential perjury, the exculpatory potential of such information, and the extreme impeachment capacity of such information, the Government's action in following the letter of 18 U.S.C. §3500 and waiting until just before Curran's testifying was inexcusable.

That the prosecution was aware of Curran's testimony is obvious. That the prosecutor would permit the direct and cross-examination of Lombardo to go forward without concern over the contradiction in Lombardo's past criminal activity is suspicious and unforgivable. *Agurs* held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair (see *Mooney* v. *Holohan*, 294 U.S. 103, 55 S.Ct. 340), and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury (see *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763).

There is a major responsibility on the part of the prosecution to insure a fair trial. The prosecution must produce any evidence which creates a reasonable doubt as to guilt. *Agurs, supra*, 96 S.Ct. 2401-2. In *United States* v. *McCrane*, 547 F.2d 204 (1976) an issue extremely similar to this was addressed by the Third Circuit. There the facts involved

a request for impeaching matter. Found to be error was the failure to produce letters written by the United States Attorney on behalf of the chief prosecution witness. These letters could have been indicative of preferential treatment and could have opened up avenues of inquiry into the relationship between the witness and the United States Attorney's Office. Because of their impeachment potential, the Government's failure to produce the letters in the discovery process was grounds for a new trial. The failure to produce the grand jury testimony of Curran at an appropriate time so as to fully utilize its impact must be considered error under the same standard.

In *United States* v. *Pollack*; 534 F.2d 964, 973 (D.C. Cir. 1976), the Court stated that:

> "Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure. See, e.g., *United States* v. *Elmore*, 423 F.2d 775, 779 (4th Cir. 1970); *United States* v. *Deutsch*, 373 F.Supp. 289, 290-91 (S.D. N.Y. 1974). The trial judge must be given a wide measure of discretion to ensure satisfaction of this standard. While some courts have held that *Brady* affords no pre-trial discovery rights to defendants, see *United States* v. *Moore*, 439 F.2d 1107 (6th Cir. 1971); *United States* v. *Manhattan Brush Co.*, 38 F.R.D. 4 (S.D. N.Y. 1965), we believe that application of a strict rule in this area would inevitably produce some situations in which late disclosure would emasculate the effects of *Brady* or other situations in which premature disclosure would unnecessarily encourage those dangers that militate against extensive discovery in criminal cases, e.g., potential for manufacture of defense evidence or bribing of witnesses. Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions."

In *United States* v. *Butler*, 567 F.2d 885 (9th Cir. 1978), the Ninth Circuit reiterated the point that:

> "[T]he government is obliged to disclose pertinent material evidence favorable to the defense, and this applies not only to matters of substance, but to matters relating to the credibility of government witnesses. *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

By not allowing defense counsel access to Curran's statement until after Lombardo had testified, the opportunity for effective employment of impeachment techniques, so important to a defendant's ability to acquit himself, was irretrievably lost. To place the burden upon petitioner for the prosecution's failure to recognize or to deliver exculpatory materials at the appropriate time is an unfair hardship. This Court ought to grant this Writ in order to solidify the principles of fairness and openness in the determination of criminal guilt.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. BALLIRO
MARK G. MILIOTIS
One Center Plaza
Boston, Massachusetts 02108
(617) 227-5822
Attorneys for Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1424

UNITED STATES OF AMERICA,
APPELLEE,
v.
ARTHUR J. STRAHL,
DEFENDANT, APPELLANT,

No. 77-1425

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOSEPH V. PUZZANGARA,
DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. FRANK H. FREEDMAN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
KUNZIG,* *Judge, U.S. Court of Claims*,
DUMBAULD,** *Senior District Judge.*

Joseph J. Balliro, with whom *Mark G. Miliotis*, was on brief, for appellant, Arthur Strahl.
Harvey Brower, appearing for appellant, Joseph Puzzangara.
Kevin J. O'Dea, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

* Sitting by designation.
** Of the Western District of Pennsylvania, sitting by designation.

December 26, 1978

COFFIN, *Chief Judge.* Appellant Strahl appeals from his conviction of possession of a $5,000 United States Treasury note stolen from the United States mails, of counterfeiting and conspiring to counterfeit approximately $700,000 worth of $5,000 Treasury notes, and of possessing, concealing, and attempting to pass the counterfeited notes, 18 U.S.C. §§ 371, 471, 472, 1708. He was sentenced, after a jury trial, to four years imprisonment on the conspiracy charges to run concurrently. Appellant Puzzangara, a co-defendant of Strahl at trial, was found guilty of possession of the stolen note and the conspiracy charge and sentenced to five years imprisonment and a consecutive five year suspended sentence with probation. Both appeal from the judgments of conviction, challenging the admissibility of certain evidence at trial and the government's failure to produce several "statements", allegedly in violation of the Jencks Act, 18 U.S.C. § 3500.

1. *The attorney-client privilege*

At trial the government called as a witness one Markella, an attorney of Strahl over a number of years. Over defense attorneys' repeated objections, Markella was allowed to identify Strahl as the man who had given him, in partial payments for legal fees or debts owed, the stolen Treasury note in question.[1] Appellant argues that although the identity of the client and payment of fees generally are not within the attorney-client privilege (which protects confidential *communications*), *United States* v. *Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir. 1977); *In re Grand Jury Proceedings,* 517 F.2d 666, 670-71 & n. 2 (5th Cir. 1975), the facts of this case remove it from the general rule.

[1] This issue concerns only Strahl's appeal since there was no evidence of any attorney-client relationship between Markella and Puzzangara.

Beginning with the often cited case of *Baird* v. *Koerner,* 279 F.2d 623 (9th Cir. 1960), courts have recognized an exception to this general rule when "the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source." *Colton* v. *United States,* 306 F.2d 633, 637 (2d Cir. 1962). *See In re Grand Jury Proceedings, supra,* 517 F.2d at 671-72; *NLRB* v. *Harvey,* 349 F.2d 900, 905 (4th Cir. 1965). In *Baird* an IRS summons sought disclosure of the identity of the clients on whose behalf the attorney had made an anonymous tax payment, 279 F.2d at 625. The court held that the attorney need not disclose the identity of his clients, citing the particular facts of the case, *Id.* at 631.

We find the *Baird* case distinguishable from this one. In *Baird,* "disclosure of [the identity] of the client would [have] implicate[d] that client in the very criminal activity for which legal advice was sought." *United States* v. *Hodge and Zweig, supra,* 548 F.2d at 1353. There is no indication, either in the briefs or the record, that appellant Strahl went to Markella for legal advice concerning his counterfeiting activities and disclosed confidential information to him. The testimony at trial indicates that the stolen Treasury note was passed to Markella as payment for past legal fees which had accumulated or to satisfy an unrelated debt.

We can find no furtherance of the policies behind the attorney-client privilege, *see United States* v. *Fisher,* 425 U.S. 391, 403 (1976); *United States* v. *Osborn,* 561 F.2d 1334, 1339 (9th Cir. 1977), that would result from shielding the payment of an attorney with stolen goods — a fraudulent act as well as a convenient means of unloading highly incriminating evidence, possession of which was itself a crime, 18 U.S.C. § 1708. Accordingly we hold that the attorney-client privilege was not violated when Markella

testified that Strahl was the person who passed the stolen note to him.

2. *The relevance of seized counterfeited notes*

Appellants contend that the trial court erred in admitting into evidence testimony by a Secret Service agent and records showing that approximately 140 counterfeit $5,000 United States Treasury notes had been seized in Florida and Maryland, that they had been produced from the genuine note that had been passed from Strahl to Markella, and that before the seizure of these same notes, no other counterfeit $5,000 notes had come to the attention of the Secret Service. At trial and on appeal, appellants contested the relevance of the seized counterfeit notes, Fed. R. Evid. 401, 402, 403.

Wide discretion as to the relevancy of evidence is vested in the trial judge, both as to its probative value and its prejudicial impact. *United States* v. *DeVincent*, 546 F.2d 452, 457 (1st Cir. 1976); *United States* v. *Cowden*, 545 F.2d 257, 268 (1st Cir. 1976), and we cannot say that that discretion was in any way abused here. It is clear without further elaboration that the existence of these counterfeited notes and testimony linking them to appellants constituted "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." Fed. R. Evid. 401.

3. *Competency of government witness*

Appellant Strahl also argues that the testimony of witness Curran, a key participant in the counterfeiting scheme who testified for the government, should have been struck as incredible and not worthy of jury consideration. Specifically, he claims that the witness's memory ebbed and faded, his demeanor was argumentative, and that he drank heavily at the time of critical events about which he testified.

The district judge enjoys considerable discretion in determining the competency of witnesses. *See* Fed R. Evid. 104(a); *United States* v. *Gerry*, 515 F.2d 130, 137 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Crosby*, 462 F.2d 1201 (D.C. Cir. 1972). Moreover, we believe that the appellants' objections were suitably treated as questions concerning the credibility of the witness rather than his competency. The jury was made aware of Curran's drinking problems, his prior criminal history, his involvement in the counterfeiting scheme and the government favors he received for his cooperation. His credibility as a witness was for the jury to determine, as the district court properly ruled. *See United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975).

4. *Delay in providing testimony received by grand jury*

At trial, appellants moved for a mistrial or dismissal for the government's alleged failure to timely produce exculpatory material. We find that the district court properly denied these motions.

The testimony in question was that of government witness Curran before the grand jury, in particular a statement by Curran that he believed, although he did not "remember how he learned", that government witness Lombardo was the cameraman on counterfeit checks that Curran had done for appellant Strahl on a previous occasion. The government furnished the defense with this information after Curran testified. Appellants contend that it should have been furnished at an earlier point in the trial, after Lombardo testified and claim both that this delay deprived them of due process, *see United States* v. *Agurs*, 427 U.S. 97 (1976), and that it violated the timetable of the Jencks Act, 18 U.S.C. § 3500.

In *United States* v. *Agurs, supra,* the Supreme Court held that the prosecutor's obligation to disclose evidence in his possession that would be material to the defense arises in three contexts — when the prosecution has used perjured testimony, when the defense has made a specific request for evidence, and when the defense has made either a general request or no request for exculpatory evidence. 427 U.S. at 103. Because a general request was made by appellants, only the third context is relevant here, in which the standard for materiality is a stringent one: "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed . . . ."

We note first that Curran's grand jury testimony was useful, if at all,[2] only for impeaching Lombardo. We are not faced with a situation, as in *Agurs,* in which the withheld evidence may have been exculpatory, and the circuit courts have expressed uncertainty about applying *Agurs* to purely impeaching evidence. *See United States* v. *McCrane,* 547 F.2d 204, 205-06 (3d Cir. 1976); *Garrison* v. *Maggio,* 540 F.2d 1271, 1273-74 (5th Cir. 1976), *cert. denied,* 431 U.S. 940 (1977); *United States* v. *Lasky,* 548 F.2d 835, 839 n.3 (9th Cir. 1977). We need not reach that question here, however, because it is clear that the grand jury testimony of Curran falls considerably short of the standard of materiality demanded by *Agurs,* even if it is applicable. This is not a case in which the evidence of guilt was tenuous, and Lombardo's participation in this counterfeiting scheme was known to the jury. We cannot say that impeachment of Lombardo with his hearsay and rather vague grand jury testimony concerning his past activities would

[2] Lombardo's testimony was that he had met Curran only socially, "probably", but never in connection with any counterfeiting activity. The contradiction between this and Curran's belief that Lombardo had been involved as a cameraman does not impress us as formidable impeachment material.

have raised a reasonable doubt in the jury's mind. *See United States* v. *Oliver,* 570 F.2d 397, 401-02 (1st Cir. 1978).

Moreover, Curran's testimony was turned over to the defense at trial, albeit after Lombardo had already been cross-examined. As the district judge pointed out to the defense at trial, any possible prejudice easily could have been cured by cross-examining Curran or by recalling after Curran testified, *see United States* v. *Kaplan,* 554 F.2d 577, 580 (3d Cir. 1977), and failure to pursue either route belies the defense claim concerning the exculpatory importance of the testimony. We find that there was no due process violation occasioned by the delay.

We are unpersuaded as well by the appellant's Jencks Act argument, 18 U.S.C. § 3500. Section 3500(a) of the Act provides that "In any criminal prosecution . . . no statement or report in the possession of the United States which was made by a government witness . . . to an agent of the Government shall be subject to subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.*" (Emphasis added.) The statement in question was that of Curran, and the government produced it at trial, after his testimony, in a timely fashion. The fact that Curran mentioned Lombardo does not mean that the Act's requirements were triggered by Lombardo's testimony.

5. *Denial of defense request for witness' "statement"*

Appellants' most serious grievance, we believe, is the manner in which the court below denied their request for a "statement", 18 U.S.C. § 3500(e), made by government witness Lombardo to the Assistant United States Attorney. This request also was made pursuant to the Jencks Act, 18 U.S.C. § 3500.

The district court, after a defense motion to produce the material, held a bench conference during which the government attorney assured the judge that the personal

notes he had made when interviewing Lombardo in preparation for his grand jury testimony were not a "statement" within the meaning of the Jencks Act.[3] The motion was denied, renewed again when additional information about the interview was elicited from Lombardo during cross-examination, and denied once again.

We are not without guidance in determining the meaning of the term "statement" or the procedures by which that determination is to be made by the trial court. In *Goldberg* v. *United States*, 425 U.S. 94, 98 (1976), the Supreme Court held that if a writing prepared by a government lawyer has been signed or otherwise adopted or approved by the government witness, it is producible under the Jencks Act. It "is not rendered nonproducible because a Government lawyer interviews the witness and writes the 'statement.'" *Id.* In a footnote, the *Goldberg* Court explained that every witness interview will involve conversations between the lawyer and witness, but the § 3500(e)(1) requirement that the witness has "signed or otherwise adopted or approved" what the lawyer has written "clearly is not met when the lawyer does not read back or the witness does not read, what the lawyer has written." *Id.* at 110n. 19.

The task of the district court, then, was to decide whether Lombardo had signed or, in some other way, adopted or approved the interview notes made by the government attorney. This determination is of course one of fact and

[3] 18 U.S.C. § 3500 reads in relevant part:

"(e) The term 'statement,' as used in . . . this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

will not be disturbed on appeal unless it was "clearly erroneous". *See Campbell* v. *United States*, 373 U.S. 487, 493 (1963) (*Campbell II*); *United States* v. *Carrillo*, 561 F.2d 1125, 1128-29 (5th Cir. 1977). But we are troubled by the procedures used by the court in reaching its conclusion. In *Campbell* v. *United States*, 365 U.S. 85, 95 (1961) (*Campbell I*), the Court noted that an inquiry into the existence of a Jencks Act "statement" was not an adversary proceeding, but read the Act as imposing a duty on the trial judge to "secure relevant and available evidence necessary" to resolve the conflicting interests at stake. Finding the inquiry in that case defective, the Court remanded for further proceedings. When the case reached the Court again in *Campbell II*, *supra*, it adopted this court's holding that in a Jencks Act inquiry into the existence of a "statement", the trial judge must consider not only the testimony of the interviewing attorney but the witness as well, 373 U.S. at 494. *See Campbell* v. *United States*, 296 F.2d 527, 534 (1st Cir. 1961), *vacated and remanded*, 373 U.S. 487 (1963).[4]

The district court's first denial of the defense motion to produce Lombardo's "statement" was based solely on the government attorney's assurances at the bench.[5] Had the issue been dropped there, we would be compelled to remand for a more thorough hearing. We believe, however,

[4] The Supreme Court reversed that part of our decision finding that the report in question was not a Jencks Act "statement" and held that the question was one of fact, not to be disturbed on appeal unless "clearly erroneous". *Campbell* v. *United States*, 373 U.S. 487, 491-93 (1963) (*Campbell II*).

[5] The government attorney's opinion at the bench that his notes were privileged work product and thus not producible under the Jencks Act was clearly without merit in light of *Goldberg* v. *United States*, 425 U.S. 94, 108 (1976), in which the Court specifically rejected a blanket work product exception to the Act. The district court's conclusion that the interview notes were not a "statement" satisfies us that the defense motion was not denied because of the work product doctrine.

that the cross-examination of Lombardo by the defense elicited enough — although barely enough — information to form a basis for the judge's decision, when the motion was again denied, that Lombardo had not adopted or approved the interview notes. Nevertheless, it must be emphasized that the inquiry was only minimally adequate. The court played no role in eliciting Lombardo's testimony and made no attempt to clarify the witness's rather vague responses. The interests protected by the Jencks Act would be better served by a more active participation by the court than occurred here.

Based on the government attorney's assurances that he merely had made interview notes and that there had been no signature, adoption or approval by the witness, coupled with Lombardo's testimony that the attorney only "went over it with me", we cannot say that the court's decision that the interview notes were not a Jencks Act "statement" was clearly erroneous. We have concluded, therefore, that the case should not be remanded. Our conclusion is reinforced by the strong evidence of guilt in this case gathered from sources other than Lombardo, the fact that the defense had another "statement" of Lombardo's with which to impeach that witness, and the extensive impeachment of Lombardo on cross-examination.

Accordingly, the judgments below are affirmed.

APPENDIX B

Statutes Involved

18 U.S.C. 371. Conspiracy To Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 471. Obligations or Securities of United States

Whoever with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. 472. Uttering Counterfeit Obligations or Securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. 1708. THEFT OR RECEIPT OF STOLEN MAIL MATTER GENERALLY

Whoever, steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. §3500.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the exami-

nation of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

"(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."